IN THE

Supreme Court of the United States

October Term, 1940.

No. 322.

J. EMORY ADAMS, SEYMOUR WEISS and LOUIS C. LeSAGE,

Petitioners,

vs.

UNITED STATES OF AMERICA.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

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DAVID V. CAHILL,
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AGAINST
UNITED STATES OF AMERICA.
No. 322.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners respectfully pray that a rehearing be granted of the petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit filed herein and denied on the 21st day of October, 1940.

Questions Presented By Former Petitions.

The Petition and an Additional and Supplemental Petition filed herein presented the following questions:

1. Whether the petitioners caused a check to be placed in the mails for the purpose of executing the scheme charged, where a bank, which had cashed the check for one of the defendants, used the mails for the sole purpose of obtaining payment for itself of the paper which it had purchased.

2. Whether a defendant may cause and be criminally responsible for the act of another where the relationship of principal and agent does not exist.

3. Whether intent to use the mails is an essential element of the crime charged where the indictment alleges that the scheme devised "was to be effected by the use and misuse of the post office establishment of the United States" (R., 4).

The Petition and the Additional and Supplemental Petition in presenting the first question to the Court for its consideration urged that the record showed that the act of mailing made the basis of each count of the indictment was not the act of the petitioners and was not in furtherance of the scheme charged. It is believed that this question could have rested and perhaps should have rested on the indictment alone and not upon a review of the evidence.

Additional Questions Presented.

The petition for a rehearing presents the following additional questions:

1. Whether the indictment on its face shows that the United States District Court for the Eastern District of Louisiana was without jurisdiction to try or pass judgment upon the petitioners.

2. Whether the natural and probable consequence rule applies where the act of the defendant is not the proximate cause of the mails being used.

3. Whether proof of a general custom of mailing by the bank is sufficient to establish that the check was caused to be placed in the mails by the petitioners.

ARGUMENT.

I.

The indictment on its face shows that the trial court was without jurisdiction to try or pass judgment upon the petitioners.

The scheme to defraud charged in the indictment is not within the jurisdiction of the federal court and can be brought within that jurisdiction only by charging that the defendants used the United States mails "for the purpose of executing such a scheme or artifice or attempting so to do."

Generally it is all-sufficient to allege, having charged the scheme, that the defendant "for the purpose of executing such scheme or artifice or attempting so to do" placed the letter, describing it, in the mail.

Even though the instant indictment alleges that the defendants "for the purpose of executing the scheme and artifice aforesaid * * * did knowingly deposit and cause to be deposited" the $75,000 L. S. U. check in the mail, it negatives this conclusion by its positive averment of facts. These facts clearly and unmistakably show that the check was not deposited in the United States mail for the purpose of executing or attempting to execute the fraudulent scheme. The trial court on such an in-

dictment had no jurisdiction to try or pass judgment upon the defendants. *Dyhre* v. *Hudspeth,* 106 F. (2d) 286.

The instant indictment alleges "that on the 27th day of October, 1936, the said check was cashed at the said City Branch of the Whitney National Bank and the sum of $75,000 in currency was handed by the bank to the defendant Monte E. Hart" (R., 7). The indictment thus charges a sale of the check by Hart and the purchase of it by the Whitney Bank. Upon delivery of the check to the Whitney Bank it became the owner thereof and was in no sense the agent of the defendants for the purpose of collecting the amount of the check from the City National Bank of Baton Rouge, the bank upon which it was drawn. *Burton* v. *United States,* 196 U. S. 283, 297.

The indictment further charges that the Whitney Bank cleared said check through the Federal Reserve Bank at New Orleans and that the Federal Reserve Bank "in order to effect payment of said check forwarded the said check on the 28th day of October, 1936, to the City National Bank in Baton Rouge, Louisiana by depositing same" in the United States mail (R., 8). The indictment thus charges that the Whitney Bank *caused* the Federal Reserve Bank to use the mails for the purpose of effecting payment of the $75,000 L. S. U. check of which at the time it was the owner.

Such a use of the mails could not be in furtherance of the scheme to defraud charged to have been devised by the defendants as Hart and the other defendants had no concern with the check after title to it had passed to the Whitney Bank. As said by this Court in *Burton* v. *United States, supra,* 297, "From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up, or thrown it in the fire, or made any other use or disposition of it that it cared to and no rights of the defendant would have been infringed."

The indictment clearly charges facts which show that the use of the mails was not for the purpose of executing or attempting to execute the scheme charged. The trial court on such an indictment had no jurisdiction to try or pass judgment upon the defendants. Absence of jurisdiction clearly appears upon the face of the record.

II.

The natural and probable consequence rule does not apply to the instant case, as Hart's act in cashing the check with the bank was not the proximate cause of the check being placed in the mails to be forwarded to Baton Rouge for collection.

The act of the Whitney Bank in causing the check to be placed in the mails to be sent to the City National Bank of Baton Rouge for collection was the independent act of the bank (Additional and Supplemental Petition, pp. 7, 8).

Under the test laid down by the Courts in applying the natural and probable consequence rule, it is clear that in the line of causation the defendant's act must be the proximate cause of the letter, check or other matter being placed in the mails. *Demolli* v. *United States,* 144 Fed. 363, 366; *United States* v. *Weisman,* 83 F. (2d) 470, 474.

The test in determining whether the defendant's act is the proximate cause of the mails being used is, whether there is an unbroken connection between the defendant's act and the use of the mails.

Even the natural and probable consequences of a wrongful act or omission are not chargeable to the original wrongdoer in a negligence action, if there is a suffi-

cient independent cause operating between the wrong and the injury. *Milwaukee, etc. Ry. Co.* v. *Kellogg,* 94 U. S. 469; *The Milwaukee Bridge,* 15 F. (2d) 249-251.

Inasmuch as the act of the bank in placing the check in the mails was the independent act of the bank, it follows that Hart's act in cashing the check was not the proximate cause of the check being placed in the mails, and that the natural and probable consequence rule has no application to the instant case.

III.

Proof of a general custom of mailing by the bank, alleged to have forwarded the check by mail, is insufficient to establish that the petitioners caused the check to be placed in the mails.

The only evidence in the record relating to the use of the mails is that of general custom of mailing by the Federal Reserve Bank and the City National Bank of Baton Rouge.

No one testified that the cash letter and check was actually mailed or that the cash letter was addressed to the City National Bank of Baton Rouge, Louisiana, or placed in an authorized depository for mailing. No envelope to show such a course was introduced in evidence.

It is plainly evident from the statute that the mailing in furtherance of the fraud is the crux of the crime declared therein. Necessarily, therefore, the mailing in furtherance of the fraud must be proved before a conviction can be had or sustained. The proof need not be direct. It may be circumstantial, but the circumstances proven must be such as will directly support an inference of the fact to be established. An inference essential to the estab-

lishment of the crime cannot be rested upon another inference.

From the fact that it was the custom of the bank to mail a letter addressed to an out-of-town bank, it was necessary to infer that the letter had been mailed, and from the inference that it had been mailed it was necessary to infer that the defendants mailed it or caused it to be mailed. Such proof has been condemned by the Circuit Court of Appeals, Seventh Circuit, in *Mackett* v. *United States*, 90 F. (2d) 462, and by the Circuit Court of Appeals, Third Circuit, in the recent case of *Whealton* v. *United States*, 113 F. (2d) 710.

It is respectfully urged that the foregoing reasons merit reconsideration of the petition and the granting of the writ of certiorari.

Respectfully submitted,

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I hereby certify that the above petition for a rehearing is filed in good faith upon a real and substantial ground, and not for mere purpose of delay.

Dated, New York, October 29, 1940.

DAVID V. CAHILL,
Of Counsel for Petitioners.